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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVE WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

## Comments

### DOWER, HOMESTEAD ESTATE, HOMESTEAD ALLOWANCE, AND RELEASE OF MARITAL RIGHTS UNDER THE NEW MISSOURI PROBATE CODE

#### I. INTRODUCTION

The Missouri Probate Code of 1955, effective January 1, 1956, abolishes common law dower, statutory dower,<sup>1</sup> and the homestead estate, and replaces them

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1. "The estates of curtesy and dower are hereby abolished, but any such estate now vested is not affected by this Code." Mo. REV. STAT. § 474.110 (Supp. 1955) (Laws 1955, p. —, H.B. No. 30, § 246).

with what the Code calls a homestead allowance.<sup>2</sup>

At common law the widow was endowed of the third part of freehold estates of inheritance of which her husband was seised during coverture, to hold during her lifetime. During the lifetime of the husband, the wife's interest was known as inchoate dower, which was not an estate. After the husband's death her interest was known as dower consummate, and after dower was assigned by the heir, the widow had an ordinary life estate.<sup>3</sup>

Missouri's statute on dower prior to the Missouri Probate Code of 1955 was *Missouri Revised Statutes*, Section 496.010 (1949), which was basically a codification of common law dower. This statute was repealed by the new Code when it took effect January 1, 1956.<sup>4</sup>

Dower has existed since the beginning of the English law of land. The purpose of dower is to protect the widow and her children. Until modern times most estates consisted principally of land, and it was to this that dower attached. Under present conditions many estates consist principally of personal property. The need for providing for sustenance and support of the wife and her children after the death of the husband and father now calls for extending the scope of dower or a substitute therefor to personalty as well as to realty in order adequately to meet this need.

The Missouri Probate Code of 1955 states that no act done in any proceeding commenced before the code takes effect and no "accrued" right shall be impaired by its provisions.<sup>5</sup> In abolishing dower and curtesy, the code states that any such estate now "vested" is not affected.<sup>6</sup>

A problem to be considered is what is an "accrued" right or a "vested" estate, each of which expressly is not affected by the new code. "Accrued" is defined in a leading law dictionary as being "acquired; fell due; made or executed; matured;

2. "At any time after the return of the inventory, the court, on application of the surviving spouse or of the guardian or person having custody of the person of the unmarried minor children of a decedent, shall make an allowance to the surviving spouse or unmarried minor children of an amount not exceeding fifty per cent of the value of the estate, exclusive of exempt property, and the allowance made under section 474.260, but in no case shall the allowance exceed seven thousand five hundred dollars. Such allowance shall be known as a homestead allowance. . . ." MO. REV. STAT. § 474.290 (Supp. 1955) (Laws, 1955, p. ——— H.B. No. 30, § 138.)

3. Eckhardt and Peterson, *Possessory Estates, Future Interests and Conveyances in Missouri*, 23 V.A.M.S., p. 25, § 27.

4. "To repeal chapters . . . 469, RSMo 1949, . . ." (Laws, 1955, p. ———, H.B. 30.)

5. "No act done in any proceeding commenced before this Code takes effect and no accrued right shall be impaired by its provisions." Special note following § 472.010 (Supp. 1955). This is § 1, Paragraph 2, MO. PROBATE CODE of 1955, enacted by Laws 1955, p. ———, H.B. 30.

6. MO. REV. STAT. § 474.110 (Supp. 1955), *supra* note 1.

occurred; received; vested.” “Accrued” is defined in *Corpus Juris Secundum* as “acquired; arose; became due; became vested; came into existence; existed; fell due; has arisen; made or executed; matured; occurred; received; vested; was created; was incurred; was in existence. . . .”<sup>7</sup> The Missouri Supreme Court has defined “vested” as meaning “fixed, accrued, or absolute.”<sup>8</sup> From the definitions of “accrued” and “vested” it appears that both words mean the same thing, i.e. “fixed or absolute,” to adopt a common definition in the words of the Missouri Supreme Court.

It would seem that the draftsmen of the Missouri Probate Code of 1955 had in mind only the normal situation, where the husband owns Blackacre on January 1, 1956 and the interest of the wife is changed from inchoate dower to the homestead allowance given by the code. In other words, inchoate dower is abolished and the homestead allowance is substituted or given in the place of inchoate dower. There seems to have been no consideration of the several situations involving dower which are discussed hereinafter.

In considering the various situations which may arise where the issue is whether dower is effectively extinguished, two problems must be kept in view: first, is the particular dower interest an accrued or vested right expressly saved by the Code; and second, if the particular dower interest is not so saved, is it a “property” right the purported extinguishment of which violates due process of law? In either case the dower interest will continue unimpaired.

## II. HUSBAND OWNS LAND WHEN CODE TAKES EFFECT

In the normal case, the husband owns land when the Code takes effect January 1, 1956. Until the effective date of the code, the interest of the wife was that of inchoate dower. The code purports to abolish inchoate dower and substitute for it the homestead allowance.

The question of whether inchoate dower is a property right and whether it may be divested by legislative action is more fully covered in Section III of this comment dealing with the situation where before the effective date of the code the husband conveyed land without joinder by the wife, and the husband dies after January 1, 1956. Even if it be assumed that inchoate dower is a property right, it would seem that its extinguishment does not violate the due process clauses, the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 10, Missouri Constitution of 1945. Although inchoate dower is extinguished, the homestead allowance has been substituted in its place.

A similar enactment occurred in Missouri in 1921, when curtesy consummate

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7. BLACKS LAW DICTIONARY 37 (4th ed. 1951).

8. 1 C.J.S. 761 (1936).

9. *Orthwein v. Germania Life Insurance Co. of City of New York*, 261 Mo. 650, 170 S.W. 885 (1914).

not yet vested was abolished, and dower was substituted for it.<sup>10</sup> This statute was held constitutional in *Duncan v. Duncan*.<sup>11</sup>

In 1917 a special statute of limitation applicable to instruments executed prior to January 1, 1900 and a reenactment in 1951 applicable to instruments executed prior to January 1, 1935, in which a spouse did not join, bars dower unless suit or sworn notice was filed within two years after the effective date of the act.<sup>12</sup> Although the constitutionality of these acts has not been attacked, the grace period for saving the interest would seem to satisfy due process, and title examiners do not question their constitutionality.<sup>13</sup>

Although dower and curtesy were extinguished in the cases covered by these acts, it was accomplished by due process of law. When curtesy consummate not yet vested was extinguished, common law or elective dower was substituted for it just as the Probate Code substitutes homestead allowance for inchoate dower. When dower, inchoate and consummate, was extinguished by the acts of 1917

10. Mo. Laws 1921, p. 119, § 1; Mo. REV. STAT. § 469.020 (1949). This interest is the same as the law gave to a widow in the real estate of her deceased husband, which was the common law or elective dower. However, the husband's interest, as distinguished from a wife's dower, is in the property of which the wife was seised at her death, by reason of the power of a married woman under Mo. REV. STAT. §§ 451.250 and 451.290 (1949) to convey her separate property without joinder by the husband. Mo. Laws 1921, p. 119, § 1; Mo. REV. STAT. § 469.020 (1949).

11. 23 S.W. 2d 91 (Mo. 1929). Partition suit. The questions presented involved the rights of the heirs to maintain a suit for compulsory partition of real estate against the opposition of the widower of an intestate decedent, as well as the extent of the marital estate of the widower in said real estate.

Anna Duncan died intestate on Mar. 4, 1924, and was at the time of her death the owner in fee simple of the land which was the subject of the partition suit, which she had acquired in 1903. Prior to this date living children were born to Anna and Willis Duncan (her widower). Plaintiff was one of six children who asked for partition, claiming a one-sixth interest subject to the widower's dower.

The Supreme Court of Missouri, Division 2, allowed partition of the two-thirds of the property after the widower's dower was assigned. In supporting its conclusion that the widower did not have a life estate in the whole by way of curtesy consummate, the court said:

"... At the time Anna Duncan became seised of the land in 1903, there was no estate of curtesy initiate in her husband, for the Married Woman's Act had abolished it, and so far as curtesy initiate in the property was concerned, it had never attached or existed. At the time of her death, there was no estate of curtesy consummate in her widower, for the act of 1921 abolished it, and consequently it never came into existence or vested.

"It is true that prior to the quoted act of 1921, the defendant Willis M. Duncan [widower] had what might be termed an inchoate expectancy or contingency of curtesy consummate in the lands of his wife. . . . In any event, such expectancy was not an estate in her lands, and the expectancy was the subject of abolishment by the Legislature at its discretion."

12. Mo. Laws 1917, p. 204; Mo. REV. STAT. § 516.060 (1949).

13. Mo. Title Examination Standard Number 6.

and 1951, the widow was given a two year grace period to file suit or sworn notice. While the Missouri Probate Code extinguishes inchoate dower forthwith upon the effective date of the Code, it gives in its place the homestead allowance, and thus there does not seem to be a deprivation of property by taking something from the wife without giving her something in return.

### III. HUSBAND, WITHOUT JOINDER OF WIFE, CONVEYED LAND BEFORE CODE AND DIES AFTER CODE TAKES EFFECT

An extreme case would be one where on December 31, 1955, the husband conveyed his real property worth \$15,000 without his wife joining in the deed, and subsequently that day lost the proceeds gambling; thereafter the husband dies on January 1, 1956, without any assets. If the Missouri Probate Code effectively extinguishes the inchoate dower which she as a wife had on December 31, 1955, she as a widow has nothing on January 1, 1956. Does the code effectively extinguish her inchoate dower?

The Missouri cases indicate that inchoate dower is neither an accrued right nor a vested estate expressly saved by the code. These cases also indicate that inchoate dower is not a property right, and therefore the legislature may extinguish inchoate dower without violating due process of law.

In 1897 the Missouri Supreme Court in the case of *Bartlett v. Ball*,<sup>14</sup> an action for the assignment of dower, in discussing the legislature's power to modify or abolish inchoate dower, said by way of dictum:

"And as the wife's right to dower is inchoate, is in expectancy, and does not become vested until the death of the husband, it follows, of course, that such right may be modified or entirely abolished by the legislature without contravening any vested right protected by the organic law."<sup>15</sup>

*Chouteau v. Missouri Pacific Railway*<sup>16</sup> was an action for assignment of dower. Plaintiff was a widow whose husband had conveyed a tract of land without her

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14. 142 Mo. 28, 43 S.W. 783 (1897). Plaintiff brought this action for assignment of dower in a lot in Louisiana, Mo. Plaintiff had married her husband and lived during the marriage out of the state. Before her husband's death, he had conveyed the lot in question by warranty deed without joinder of the plaintiff. Defendant tried to charge plaintiff as a devisee under the will of the husband under Section 8839, Mo. REV. STAT. (1889), which withholds the widow's [statutory] dower until debts of husband are paid and makes heirs and devisees liable on covenants to the extent of the land descended or devised to them. The court held that defendant was not a creditor and also that the statute did not affect the widow's dower rights when they became absolute. Judgment for plaintiff.

15. The Missouri Supreme Court then cites BLACK, CONST. LAW 430, 431; COOLEY, CONST. LIMITATIONS, 440, 441 (8th ed. 1927); *Venable v. Wabash Western Ry.*, 112 Mo. 103, 20 S.W. 493 (1892).

16. 122 Mo. 375, 22 S.W. 458 (1893).

joinder. This land came to the defendant railroad by mesne conveyances, and after the death of her husband the plaintiff brings this action. The charter of the Pacific Railroad, predecessor of the Missouri Pacific, was enacted by the Missouri legislature March 12, 1849, and amended March 1, 1851. This charter incorporated the railroad and authorized it to take the fee simple title to land for its right of way by condemnation if necessary. The land was voluntarily conveyed to the railroad, and plaintiff claimed that since she had never joined in any conveyance she was entitled to dower rights upon her husband's death. The question in this case was whether plaintiff was dowable in this property. In holding that she was not dowable, the Missouri Supreme Court, Division II, stated that the statute chartering the railroad provided in effect for the "owner" of the fee simple to relinquish the land without being affected by the wife's dower rights. The court in discussing the word "owner" said (emphasis added):

"The word 'owners' is generally employed in statutes as describing the persons who must be made parties to proceedings to establish roads and streets. In order to carry into effect the purpose of the statute, and to give just force to the provisions of the constitution, the term 'owners' should be construed to mean all those who have an estate in the land, and whose interests appear of record. This would require that all who have vested estates should be made parties, but would not apply to those who have mere liens or *inchoate* interests. Under the operation of the rule it would not be necessary to make a married woman having an inchoate interest in the lands of her husband a party to the proceeding. The principle upon which the doctrine that a wife need not be made a party rests is that the right to dower, or to an estate in the lands of the husband, is a right created by law, and not by contract, and that it is not vested until the death of the husband."

The court goes on to state ". . . the legislative body has impliedly said that the rights of no other party (than those of the owner) need be relinquished or obtained. Such an implication necessarily excludes all inchoate interests, possibilities, and expectancies."

When the Missouri Supreme Court *en banc* affirmed the decision of Division II in *Chouteau v. Missouri Pacific Railway*,<sup>17</sup> it considered the constitutionality of the acts in question to the effect that when a husband conveyed property for public use that the wife retained no inchoate dower in the property so devoted to public service. The court held (emphasis added):

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17. 122 Mo. 375, 30 S.W. 299 (1894). The authority of this case may be weakened in that the court interpreted the statute chartering the railroad as actually giving the railroad an easement rather than an fee. The easement would last so long as the property was being used for railroad purposes. No one can tell for how long the land will be used for railroad purposes; it may be forever. The fact of the uncertainty of the reversioner's interest (that to which the widow's dower would attach) ever being enjoyed by the reversioner, should not be overlooked. It has been said that such a reversioner might be denied compensation in proceedings to take the property by eminent domain.

"It only remains to inquire whether it was competent and constitutional for the legislature to declare . . . that in acquiring the estate of a husband in land subject to public use the inchoate right of dower therein is suspended during the existence of the use by the public. The right to dower in Missouri is defined by statute. During the lifetime of the husband the inchoate right thereto is not such an interest or estate as is beyond the control of the legislative power. (*Weaver v. Gregg*, (1856) 6 Ohio St. 549). It is a contingent right, not a vested estate. The Supreme Court of the United States has distinctly held that it is not "property" within the meaning of the constitutional guaranties for the protection of property. (*Randall v. Kreiger*, (1874) 23 Wall (U.S.) 148 . . . *It has ever been held, in other jurisdictions, competent for the legislature to totally abolish the right to dower, so far as legislation bears upon estates which have not vested at the time of its enactment.* (*Black v. Mining Co.*, (1892) 3 C.C.A. 312, 52 Fed. 859; *Richards v. Land Co.*, (1893) 4 C.C.A. 290, 54 Fed. 209)."

It seems obvious that the Missouri Supreme Court, when deciding the *Chouteau* case, did not consider inchoate dower as a vested estate even in any remote sense of the word. The case seems to support the proposition advanced in this comment that inchoate dower is not a vested estate, is not an accrued right, and may be changed, altered, or abolished by the legislature without violating any property right whatsoever.<sup>18</sup>

In *First National Bank of Stronghurst, Ill. v. Kirby*,<sup>19</sup> which was an action to foreclose a mortgage executed by husband and wife, but not acknowledged by them, the Missouri Supreme Court held that the plaintiff bank could not foreclose on the interest of the wife. The court in effect held that a wife did not release her inchoate right of dower by a simple deed without acknowledgment and certification. In speaking of the nature of inchoate dower the court said:

"It is a contingent right, the value of which depends wholly upon the death of the husband. It may be terminated at any time by the death of the wife. It is in no sense a vested right growing out of the contract of marriage, but is a mere expectancy or possibility incident to the marriage relation, contingent on her surviving the husband."

The court refused to consider inchoate dower as property, pointing out that if it were to be considered property, it could be levied upon against the wife, and thereby create the strong possibility of greatly tying up the husband's ability to convey his fee simple interests, since the inchoate dower right might be held by a complete stranger to the marriage relationship.<sup>20</sup>

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18. See 1 SIMES, LAW OF FUTURE INTERESTS, Ch. 3, § 47 (1936).

19. 269 Mo. 285, 190 S.W. 597 (1916).

20. "Where a husband conveys to B without the wife's joinder to release dower, the dictum would make void a subsequent quitclaim by the wife to the original grantee. Quære whether estoppel by deed would be applied where the wife's separate release is by warranty deed. The court is concerned about cases where the husband has not conveyed and the wife attempts to convey her inchoate dower to a stranger, or where a creditor of the wife attempts to reach her inchoate dower. This should not be permitted. But where the husband already has conveyed to a



*Murawski v. Murawski*<sup>21</sup> was a case in which a divorced wife claimed that she had inchoate dower in her divorced husband's undivided one-half interest in real estate which had been held by them during the marriage in a tenancy by the entirety, and which became a tenancy in common by reason of divorce for his fault. In holding that the wife had no inchoate dower interest in the husband's undivided one-half of the property because he came to such undivided one-half *eo instanti* as the marriage terminated, the Kansas City Court of Appeals said of inchoate dower (emphasis added):

"An inchoate right of dower prior to the death of the husband is a *contingent right*, and in no sense vested, but a mere expectancy or possibility incident to the marriage relationship contingent on survival."<sup>22</sup>

*Borders v. Niemueller*<sup>23</sup> was an action by a widow to recover dower, with damages, in certain real estate. The land was originally conveyed by the husband of the plaintiff without her joinder, and was owned by the defendant prior to and at the commencement of the action. The question involved in the case was whether damages were to be allowed from the date of plaintiff's initial notice to defendant of her inchoate dower before the death of her husband, or only from the date of her demand upon defendant for the assignment of dower after her husband's death. The St. Louis Court of Appeals held that she might recover only from the demand upon defendant after the death of her husband. In so holding the court said:

"The purpose and object of dower is to provide assured means of support to the widow after the death of her husband; and to that end the right attaches as an incident of the marriage relation to any lands in which the husband was seized of an estate of inheritance at any time during the marriage. So long as the husband lives the right is inchoate in the sense that it confers upon the wife no right of immediate possession or control of the land to which it attaches, but instead is merely a legal estate in expectancy, contingent upon her husband's predeceasing her. Upon the death of the husband the widow's dower ceases to be a contingency, and then becomes consummate or absolute, and subject to assignment in the appropriate manner."

The above cases in which the Missouri courts have discussed the nature of inchoate dower indicate that Missouri is in accord with the view expressed by Professor Powell: "With respect to dower it has been generally held that any

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stranger, an effective release of dower to the grantee is in accord with good policy. It is hoped that the court will not follow its dictum but will permit a separate quitclaim by a wife to her husband's grantee." Eckhardt and Peterson, *Possessory Estates, Future Interests, and Conveyances in Missouri*, 23 V.A.M.S. § 27, ft. note 87.

21. 240 Mo. App. 533, 209 S.W.2d 262 (1946) *appeal transferred*, 203 S.W.2d 714 (1947).

22. The court cites *First National Bank of Stronghurst, Ill. v. Kirby*, 269 Mo. 285, 190 S.W. 597 (1916), *supra* notes 18 & 19.

23. 239 S.W.2d 555 (Mo. 1951).

statutory changes enacted can lawfully apply to determine the rights of any woman whose husband dies after the effective date of the statute."<sup>24</sup>

It seems from the Missouri authorities that inchoate dower is not a property right of such a nature as is protected by the due process requirements of the Missouri and United States constitutions. The prevailing view seems to be that in regard to inchoate dower the wife has nothing until the husband dies, at which time dower consummate becomes an accrued right, or a vested estate, or both.

In connection with this problem it is interesting to compare the Indiana legislation of 1852 which purported to extinguish inchoate dower and in lieu thereof provided that one third of his real estate shall descend to her in fee simple.<sup>25</sup> In the first of two cases considering the problem, both stated below, the Indiana supreme court held that the legislature could extinguish inchoate dower. In the second case, after more mature consideration, the court was of the view that its earlier decision had been wrong and that inchoate dower could not be extinguished by the legislature, but in view of *stare decisis* it let its earlier decision stand.

*Noel v. Ewing*<sup>26</sup> was a case where a husband executed a will devising the bulk of his property to the defendant and making limited provision for his wife in lieu of dower; at this time a widow's interest was limited to common law dower. Thereafter in 1852, while the husband was still living, the legislature made provision for a widow to take one-third in fee against the will.<sup>27</sup> Upon the husband's death, the plaintiff widow renounced the will and claimed the statutory one-third in fee. She was opposed by the defendant, the husband's devisee, who asserted that the widow was entitled only to the dower which was in force at the time her husband acquired the property and that it was not competent for the legislature to substitute one-third in fee for dower in any case where the marriage and husband's seisin transpired prior to the taking effect of the new law. The question before the court was this: where the law at the time of the marriage or seisin and the law at the time of the husband's death conflict, which shall govern? The court, in giving the widow one-third in fee, said:

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24. 2 POWELL, THE LAW OF REAL PROPERTY § 219 (1950). Professor Powell cites the following cases to support this view: *McNeer v. McNeer*, 142 Ill. 388, 32 N.E. 681 (1892); *Strong v. Clem*, 12 Ind. 37 (1859); *Magee v. Young*, 40 Miss. 164 (1886); *Weaver v. Gregg*, 6 Ohio St. 547 (1856); *Contra: In re Alexander*, 53 N.J. Eq. 96, 30 Atl. 817 (1894).

25. Act May 14, 1852. IND. REV. STAT. c. 27 § 16. "Tenancies by the curtesy and in dower are hereby abolished."

§ 17. "If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple, free from all demands of creditors: Provided however, that where the real estate exceeds in value ten thousand dollars (\$10,000), the widow shall have one-fourth only, and where the real estate exceeds twenty thousand dollars (\$20,000), one-fifth only as against creditors."

26. 9 Ind. 37 (1857).

27. Act May 14, 1852. 1 IND. REV. STAT. c. 27.

"Marriage is not simply a contract, but a public institution, not reserved by any constitutional provision, from legislative control; and all rights in property, growing out of the marriage relation, are alike subject to regulation by the legislative power . . . Thus the legislature is competent to increase or diminish dower, or to substitute a larger estate for it, or even to abolish dower inchoate altogether."

In *Strong v. Clem*,<sup>28</sup> another Indiana case, one Jones conveyed to Parry, under whom the defendant Clem claims, without joinder of Jones' wife and at a time where her interest was inchoate dower. Thereafter in 1852, while Jones was still living, the legislature abolished dower and gave her one-third in fee where a husband conveyed without joinder of his wife. After Jones died his widow assigned her interest to the plaintiff Strong who claimed one-third in fee, the enlarged interest of the widow.

The court in holding for the defendant said:

"The plaintiff, then, cannot maintain this action upon the dower right of the widow. That never vested. Before the death of the husband, the event necessary to the consummation of that right, the right itself was abolished by law. The law came in the place of the death of the wife, and determined the contingency as to the vesting of dower in favor of the purchaser of the land.

"The plaintiff cannot maintain his action upon the fee simple right, as it never vested. It was never, indeed even inchoately created. . . . hence, the decision of the lower court (for defendant) must be affirmed."

The writer, Judge Perkins, in referring to *Noel v. Ewing*,<sup>29</sup> added to this opinion by way of dictum:

"The writer of this, thought that decision wrong, and has not yet changed his opinion. But it is now an authority which it is better for the public interest that this Court should follow, so far as it is an authority, than to overrule it. That case decided that inchoate rights of dower were abolished; and all the judges conceded the power of the legislature to abolish such rights, because they were not consummate. . . ."

Under the situation outlined at the beginning of this section, the Missouri Probate Code of 1955 purports to extinguish inchoate dower, but substitutes nothing in its place. There is then a distinct possibility that the Missouri courts may hold unconstitutional the section of the code abolishing dower, insofar as it covers this type of case. It is significant that in the past the legislature (except in the condemnation case) never has *ipso facto* extinguished dower or curtesy, but either has substituted some other interest or has given a reasonable grace period to protect and preserve the interest.

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28. 12 Ind. 37 (1859).

29. 9 Ind. 37 (1857), *supra* note 24.

## IV. DOWER CONSUMMATE, WHERE HUSBAND DIED BEFORE CODE TAKES EFFECT

Where dower already has been assigned prior to January 1, 1956, the surviving spouse holds a present possessory estate which is both an "accrued" right and a "vested" estate not affected by the code.<sup>30</sup>

Where dower is consummate prior to January 1, 1956, but as yet unassigned prior to January 1, 1956, the problem arises as to whether such unassigned dower consummate is either a vested estate or an accrued right, or whether it would be extinguished under *Missouri Revised Statutes*, Section 474.110 (Supp. 1955) of the code. It is believed that such unassigned dower consummate is a vested estate under Section 474.110, and therefore is not extinguished by that section.

The cases cited in Section III of this comment support the reasoning that dower consummate at the time the Probate Code takes effect is not extinguished, because it is an accrued right or a vested estate. While the cases were cited and discussed to show that inchoate dower probably is neither an accrued right nor a vested estate, they also serve to show that the courts in Missouri have regarded dower consummate as a vested estate, within the meaning of that term as used in the Missouri Probate Code of 1955.

## V. HOMESTEAD ESTATE, FAILURE TO REPEAL OLD SECTIONS

Another problem to consider in regard to the Missouri Probate Code of 1955 is whether the present Missouri statutes on homestead after death, sections 513.-495 and 513.500, are still in effect, and whether the new homestead allowance provision of the code, section 474.290, is valid. The problem arises because the

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30. *Supra* notes 1 and 5. The same conclusion would apply to vested estates of curtesy. "At common law a husband had an estate in the freehold estates of his wife, for their joint lives, known as *jure uxoris*, or estate in the right of the wife. Upon birth of issue alive, the estate was known as curtesy initiate, and was a life estate for the life of the husband. (This of course could not apply to a life estate in the wife measured by her own life, but applied to the wife's freeholds of inheritance.) After the death of the wife the estate was known as curtesy consummate. Under these various life estates the husband was entitled to the rents and profits, could alienate the same and they were subject to seizure by the husband's creditors." Eckhardt and Peterson, *Possessory Estates, Future Interests, and Conveyances in Missouri*, 23 V.A.M.S. p. 28, § 29.

Curtesy was abolished by an act of the Missouri Legislature on June 20, 1921 (Mo. REV. STAT. § 469.020 (1949)). Therefore the only curtesy estates in Missouri at the present time are those given to the husband where the wife acquired the estate and died before June 20, 1921.

For the purposes of this comment, curtesy has been treated in the same manner as dower, and the term "dower" has been used to include both dower and curtesy.

The case where a wife acquired property prior to the married women's act of 1889, and both husband and wife are still living, presents special problems. Such cases are very rare today and have been excluded from consideration.

old sections are not included in the repealer, and the subject of the homestead allowance is not mentioned in the title of the act.<sup>31</sup>

The failure to repeal sections 513.495 and 513.500 by including them in the title of the code seems to have been an oversight. It is possible that these sections have been repealed by implication, in that the body of the code includes many clear and concise references to the substituted homestead allowance, such as sections 474.290, 474.300, 474.140, and 474.230, and in that section 474.290 expressly refers to the repeal of these sections.

Judge Leslie A. Welch, of the Jackson County Probate Court, Chairman of the Probate Laws Revision Committee of the Bar, points out in an article that the title does not refer to the present homestead estates in sections 513.490 and 513.500, and remarks, "If necessary, no doubt they can be expressly repealed promptly after the convening of the next General Assembly and the new homestead sections reenacted. In the meantime it is hoped that no substantial difficulties will arise."<sup>32</sup>

#### VI. HOMESTEAD ALLOWANCE, FAILURE TO MENTION IN TITLE OF ACT

Substantial difficulties could arise, as pointed out above, under Article 3, Section 23, Missouri Constitution of 1945, the single subject provision which requires that the subject be clearly expressed in the title.<sup>33</sup> Because the title does not refer to homestead, the new homestead allowance provisions in the code may be held invalid. But the title probably will be found to cover homestead in that it states, after giving the chapters and sections repealed, that they all relate to probate laws of Missouri, including descent and distribution, wills, administration of estates of decedent, guardianship of minors and insane persons, probate courts and estates of dower, and to enact in lieu thereof a probate code relating to the same subject. Since the homestead estate was commonly regarded as a probate matter and handled by Probate Courts, it can be argued that the title in referring to Probate matters sufficiently mentions homestead.

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31. "AN ACT To repeal chapters 457, 458, 462, 463, 464, 465, 467, 468, and 469, RSMo 1949 and sections 461.010 to 461.770, 461.890, 481.020, 481.030, 481.040, 481.070, 481.130, 483.480 and 484.030, RSMo 1948, and also to repeal sections 457-090, 458.020, 458.030, 461.120 and 464.040, RSMo 1953, Supp., all relating to the probate laws of Missouri, including descent and distribution, wills, administration of estates of decedents, guardianship of minors and insane persons, probate courts and estates of dower, and to enact in lieu thereof a probate code relating to the same subject." Mo. Laws 1955, p. —.

32. *Outline of Principal Changes of New Probate Code, H.B. 30, Effective January 1, 1956*, 11 J. Mo. Bar 145 (1955).

33. Mo. CONST. art. 3, § 23 (1945) states: "No bill shall contain more than one subject which shall be clearly expressed in the title, except bills enacted under the third exception in Section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated."

VII. HUSBAND'S CONVEYANCE PRIOR TO THE CODE OF HOMESTEAD  
WITHOUT WIFE'S JOINDER

*Missouri Revised Statutes* of 1949, Section 513.475, states that "the husband shall be debarred from and incapable of selling, mortgaging, or alienating the homestead in any manner whatever; and every such sale, mortgage, or alienation is hereby declared null and void. . ."<sup>34</sup>

It would seem clear that a husband's conveyance of the excess over homestead without joinder of his wife, was valid, subject to dower.<sup>35</sup> It is not clear whether his conveyance was effective as to the remainder after homestead. Of course his conveyance was not effective as to the homestead itself, the determinable life estate in his widow and minor children.

It has never been decided whether sections 516.060 and 516.065, curative acts on unreleased marital interests, cover unreleased homestead. Section 516.060 is cited in only two reported decisions and neither of these cases deals with homestead.<sup>36</sup> Section 516.060, in that it bars "any right, title, interest, or estate" of the non-joining wife, is enough to cover homestead as well as dower. Whether section 516.060 effectively bars homestead is obscured by section 513.475, quoted above, which provides that a husband's conveyance of homestead without joinder of his wife is "null and void."

The better views, with reference to conveyance of homestead without joinder of the wife, although not as yet clearly established under Missouri case authority, would seem to be as follows: the husband's conveyance is good as to the remainder after homestead (as distinguished from the excess over homestead); an abandonment by husband and wife of homestead in the land in question (most often by removal or transfer of homestead to other land) validates the husband's conveyance of homestead; and the doctrine of estoppel by deed is applicable to the husband's conveyance of homestead.<sup>37</sup>

If the homestead provisions of sections 513.490 and 513.500 have been repealed by implication and what may be called inchoate homestead is effectively extinguished, what effect will this have on conveyances of homestead without joinder of the wife made prior to the code? Does this have the effect of validating a conveyance of homestead by the husband without joinder of the wife which section 513.475 said was "null and void?"

34. *Gum v. Wolfenbarger*, 338 Mo. 968, 93 S.W. 2d 667 (1936).

35. *Fields v. Jacobi*, 181 S.W. 65 (Mo. 1915); *Stephens v. Stephens*, 183 S.W. 572 (Mo. 1916); *Grown v. O'Donnell*, 272 Mo. 167, 198 S.W. 863 (1917); *Saxbury v. Coons*, 98 S.W. 2d 662 (Mo 1936).

36. *Hubbard v. Keen*, 297 Mo. 29, 41, 247 S.W. 1000, 1004 (1923); *Wells v. Egger*, 303 Mo. 26, 38, 259 S.W. 437, 439 (1924).

37. T.E.S. No. 6, Comment: 8 Jour. Mo. Bar 155 (Aug. 1952); T.E.S. Comm. 1953.

The better view would seem to be that the conveyance of homestead by the husband without joinder of the wife was not void, but only voidable, and consequently the code would have the effect of validating these conveyances made prior to the code.

#### VIII. HOMESTEAD ALLOWANCE WHERE SURVIVING SPOUSE ELECTS TO TAKE AGAINST THE WILL

A problem arises under section 474.160 of the new Probate Code as to whether the surviving spouse who elects to take against the will is entitled to the homestead allowance. Section 474.010 covers the general rules of intestate descent, and Section 474.230 provides what effect the election to take under the will will have. The provisions of Section 474.230 read as follows:

"When a surviving spouse makes no election to take against will, he shall receive the benefit of all provisions in his favor in the will, if any, and shall share as heir, in accordance with the provisions of sections 474.010 to 474.030 hereof, in any estate undisposed by the will. By taking under the will or consenting thereto, he does not thereby waive his right to a homestead allowance under section 474.260, unless it clearly appears from the will that the provision therein made for him was intended to be in lieu of such rights or any of them."

Section 474.160 mentions nothing about the homestead allowance being given when the surviving spouse elects to take against the will. This section reads in part (emphasis added):

"When a married person dies testate as to any part of his estate, a right of election is given to the surviving spouse *solely* under the limitations and conditions herein stated:

"(1) The surviving spouse, upon election to take against the will, shall receive in addition to exempt property and the allowance under section 474.260 [family allowance], the one half of the estate. . . ."

It is to be noted that nothing whatsoever is said about receiving the homestead allowance when electing to take against the will. Judge David R. Hensley, of the St. Louis County Probate Court, points out that as stated, the terms of section 474.160 do not provide that such share shall be in addition to the homestead allowance, which may mean that the interest taken by the spouse against the will shall not include the benefits of the homestead allowance, while a legatee-spouse under the will would get a homestead allowance.<sup>38</sup> If such is the law, it will make the decision whether to elect against the will quite difficult in many cases.

However, attention is directed to section 474.230 in which it is provided in part: "By taking under the will or consenting thereto, he does not thereby waive

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38. 2 BENCH AND BAR, No. 1, p. 7, Official Publication of the Lawyers Association of St. Louis (Fall, 1955).

his right to the homestead allowance. . . ." From the language of this section it could be argued that the spouse was meant to receive a homestead allowance when taking against the will. Why else would such a provision as this be necessary to state that the surviving spouse does not waive such a homestead estate by taking under the will? For if the legislature felt that without this provision there would be doubt as to the surviving spouse having the homestead allowance in addition to taking under the will, it must have felt and intended that the surviving spouse have the homestead allowance when taking against the will and expressly extended this allowance to a spouse when electing to take under the will also.

Section 474.290 of the code states: "Such allowance shall be known as a homestead allowance, and is in addition to the exempt property and the allowance to the surviving spouse and unmarried minor children under 474.260." Since family allowance (section 474.260) and exempt property (section 474.250) are expressly stated in section 474.160 to be awarded when the surviving spouse elects to take against the will, it would seem to follow logically that the homestead allowance which is expressly stated to be in addition to the family allowance and exempt property, is also intended by the legislature to be given to the surviving spouse electing to take against the will.

Section 474.150 (1) provides:

"1. Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will."

It would seem from this provision that the legislature intended for the surviving spouse to have the homestead allowance when electing to take against the will. This returned gift shall be applied to the payment of the spouse's share just as if he elected to take against the will.

It seems that in drafting section 474.160 on taking against a will there was a mere oversight on the part of the draftsmen in omitting any express mention of the homestead allowance, and it is believed that the sections quoted above indicate a legislative intention that a spouse electing to take against a will should have a homestead allowance.

#### IX. RELEASE OF MARITAL RIGHTS UNDER THE NEW CODE

Section 474.150 (2) raises several important questions. It provides:

"Any conveyance of real estate made by a married person at any time without the express assent of his spouse, duly acknowledged, is deemed to be in fraud of the marital rights of his spouse (if the spouse becomes a surviving spouse)."



This section was originally taken from Section 33 of the Model Probate Code.<sup>39</sup> It was entitled "Gifts in fraud of marital rights," and read:

"(a) *Election to treat as devise.* Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, and as in the case of his election to take against the will.

"(b) *When gift deemed fraudulent.* Any gift made by a married person within two years of the time of his death is deemed to be in fraud of the marital rights of his surviving spouse, unless shown to the contrary."

It is said by the drafters of the Model Probate Code that subsection (b) lays down an aid in determining whether a gift is fraudulent where the proof is slight. Under this section it is possible to show that a gift made within two years of the death of a married person is not fraudulent, but the burden of proof is upon the person asserting the absence of fraud.<sup>40</sup> It is to be noted that this section dealt with the well-understood problem of gifts in fraud of marital rights. In Missouri the two principal types of cases are the gifts of realty or personalty just prior to marriage and the gifts of personalty prior to death.

For Section 251 of House Bill 30, the draftsmen used Section 33(a) of the Model Probate Code without change, but they inserted in Section 33(b) additional material covering conveyances of real estate. Section 251(b) of original House Bill 30 provided as follows (added words emphasized):

"(2) Any gift made by a married person within two years of the time or his death, *and any conveyance of real estate made by a married person at any time without the express assent of his spouse, duly acknowledged*, is deemed to be in fraud of the marital rights of his spouse unless shown to the contrary."

Then the Senate struck out the first part of the sentence as it appeared in the Model Probate Code and in the original draft of House Bill 30, added a parenthetical statement, and put the section in its final form:

"(a) Any conveyance of real estate made by a married person at any time without the express assent of his spouse, duly acknowledged, is deemed to be in fraud of the marital rights of his spouse (*if the spouse becomes a surviving spouse*) unless shown to the contrary."

In the Model Probate Code, "unless shown to the contrary" was applicable to a gift within two years of death; in the final Missouri version, section 474.150, it is applicable to a conveyance of real estate. It is to be doubted whether anyone

39. SIMES & BAYSE, MODEL PROBATE CODE, 72 (1946).

40. SIMES & BAYSE, MODEL PROBATE CODE, comment to § 33. p. 73 (1946).

intended to change the existing law with reference to a wife's joinder in her husband's conveyance of real estate, whether for valuable consideration or by way of gift. Is any conveyance for fair market value in fraud of the marital rights of the other spouse?

If the court should construe this section as making voidable a conveyance of real estate for adequate consideration where both spouses do not join in the conveyance, or there is not an effective release of marital interests, the consequences under the new code may be much more costly than under the old law. For example, Husband conveys Blackacre, not homestead, for its fair market value, \$7,500, without an effective release of the marital interests of his wife. Husband then dies, with assets of \$7,500 (above exempt property and family allowance) and debts of \$100,000. Under the former law, the grantee takes subject to wife's dower, a life estate in one-third. Under the new code, as construed above, the land becomes part of Husband's estate, the wife can take all the land in fee as homestead allowance, and the grantee can come in for his share of \$7,500 of assets which is divided between creditors with \$107,500 of claims; he will receive about 7%.

In Missouri in the past the joinder of the wife as a grantor with the husband in an acknowledged deed has been sufficient to release marital interests.<sup>41</sup> Does a joinder of both husband and wife as grantors in a duly acknowledged deed constitute an "express assent" of the spouse, or does "express assent" call for a special recital?<sup>42</sup> Until there is decision on this question, it is recommended that all deeds on and after January 1, 1956, include a recital expressly assenting to and releasing marital rights.

Did the legislature actually intend to change the method of release of marital rights? It would seem that the old method of the wife joining the husband as a grantor sufficiently protected her interests. Joinder in the deed as a grantor would seem to provide every safeguard to a spouse that express assent does.

This section would seem to cover the wife's deed as well as that of the husband since the provisions apply equally to both spouses.<sup>43</sup> Consequently a title examiner

41. Act July 7, 1807, 1 Mo. Terr. Laws, 178, § 2; as amended Mo. REV. STAT. § 442.030 (1949) (conveyances); Mo. REV. STAT. 333, § 2 (1825); as amended now Mo. REV. STAT. 442.190 (1949) (dower).

42. An example of a recital of an express release of marital rights in a warranty deed is as follows: "And for the consideration aforesaid I, \_\_\_\_\_ wife of the said \_\_\_\_\_, do hereby release all my right of dower in and to the said granted premises unto the said grantee, and his heirs and assigns forever." This clause is taken from 2 MODERN LEGAL FORMS § 3642, p. 741 (1950). See also JONES, LEGAL FORMS ANN., Ch. 28, Forms 28-3 and 28-5 (9th ed. 1946); 4 NICHOLS, CYCLOPEDIA OF LEGAL FORMS 319 (1955).

43. This seems to be true despite the consequence of the Married Women's Act of 1889, Mo. REV. STAT. §§ 451.250 and 451.290 (1949), that a married woman could convey her real property acquired after 1889 free of her husband's marital

should check to see that a husband has expressly assented to and joined in any conveyance made by his wife.

It is probable that the Missouri courts will hold that joinder in a deed is express assent, but until there is a definitive decision the only safe course is to include in a deed an express assent recital.

A clause expressly assenting to a conveyance and expressly releasing marital rights might read:

"And for the consideration aforesaid, I, \_\_\_\_\_, wife (husband) of the said \_\_\_\_\_, do hereby expressly assent to this conveyance and do hereby release all of my marital rights in and to the said granted premises unto the said party of the second part and his heirs and assigns forever."

#### X. CONCLUSION

The new probate code is an excellent example of modern probate legislation, and is a definite and pronounced forward step in Missouri probate law. Any act covering such a vast and complex field as does this code will fall short of perfection and will create some new problems. The problems discussed in this comment are almost sure to be litigated at some future date and the purpose of this comment has not been to predict what these decisions will be, but simply to point out the problems and to suggest possible lines of analysis. Legislative amendment will resolve some problems, and others will only be resolved after litigation and decisions by the Supreme Court of Missouri.

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interests without his joinder, a power a husband does not enjoy with respect to his wife's dower. *Brook v. Barker*, 287 Mo. 13, 228 S.W. 805, 14 A.L.R. 347 (1921) (curtesy); *Herzog v. Ross*, 358 Mo. 177, 213 S.W. 2d 921 (1948) (husband's dower).